Supreme Court, U.S.
FILED
MAY 29 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1551

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ALAN J. KARCHER,

Appellant,

v.

JEFFREY MAY, Et al.,

Appellees.

On Appeal From The United States Court Of Appeals For The Third Circuit

BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AND COUNCIL ON RELIGIOUS FREEDOM AS AMICI CURIAE IN SUPPORT OF APPELLEES

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INTEREST OF THE AMICI CURIAE

Americans United for Separation of Church and State (Americans United) is a nonprofit corporation formed to maintain and advance civil and religious liberties through the enforcement of the rights and privileges granted by the First and Fourteenth Amendments to the Constitution of the United States.

Americans United has over 40,000 members of various religious persuasions and some without an identification with any religious community. Its members are located in all states of the nation including the State of New Jersey.

Americans United is involved in extensive litigation of First Amendment Establishment Clause issues throughout the United States. Since 1947 it has been involved in a large portion of the Establishment Clause cases coming before this Court dealing with the application of the Establishment Clause of the First Amendment, including such noteworthy cases as *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971); *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973); *Meek* v. *Pittenger*, 421 U.S. 349 (1975); and *Grand Rapids School District* v. *Ball*, 105 S.Ct. 3216 (1985).

Americans United has a particular interest in the issues raised in this case because of its concern with the attempt to use state and local governments to convey a message that religion or a particular religion is favored by the state. Americans United believes that the role that all governments must play is one of neutrality concerning religious affairs. The separation of church and state is vital to the health of our nation.

Council on Religious Freedom Council is a nonprofit corporation founded to uphold and promote the principles of religious liberty with particular emphasis on the free exercise of religion.

The Board of Directors of the Council and its membership are composed of individuals who are active in religious affairs, some in an official capacity and others on a lay basis, but all recognizing the importance of preserving the religious neutrality of the public schools of our

nation. The Council believes that when the public schools attempt, either by direct involvement or by subtle encouragement, to bring religion into the formal school day the result can only be the trivializing of religion.

SUMMARY OF ARGUMENT

Amici curiae believe that this Court lacks jurisdiction to hear this appeal because Assemblyman Karcher lacks standing to bring it in the face of a decision by the New Jersey Legislature not to pursue this appeal. Members of collegial bodies lack standing to perfect appeals that the body has declined to bring. *Bender* v. *Williamsport Area School District*, ___ U.S. ___, 106 S.Ct. 1326 (1986). Assemblyman Karcher has no individual interest in the outcome of this case. *Daughtrey* v. *Carter*, 584 F.2d 1050 (D.C. Cir. 1978).

The proposed intervenors-appellants also lack standing under Article III of the United States Constitution and do not meet the requirements for intervention under Fed. R. Civ. P. 24(a). The intervenors do not assert a legally protected interest. They assert no right affected by the outcome of this case. Their only interest is the maintenance of a legislative scheme with which they agree. Such an interest is clearly insufficient to confer standing. *Diamond* v. *Charles*, ___ U.S. ___, 106 S.Ct. 1697 (1986).

Should the Court decide that it has jurisdiction, the decisions below should be affirmed, although some of the analyses used to reach those decisions was faulty. The educational purpose for the New Jersey moment of silence law asserted at trial is not plausible considering the language of the statute. The language, along with other factors, indicates a purpose to accommodate silent prayer. However, since no burden on that particular form of religious expression existed, the purpose of the statute

can only be the endorsement of that religious practice. The statute gives a message of endorsement of prayer. This result, intentional or not, violates the Establishment Clause. *Wallace* v. *Jaffree*, ___ U.S. ___, 105 S.Ct. 2479 (1985); *Lynch* v. *Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring).

ARGUMENT

I. THE APPELLANT DOES NOT HAVE STANDING TO BRING HIS APPEAL.

Amici curiae believe that this Court lacks jurisdiction to hear this appeal. None of the originally-named defendants contested the claims of the plaintiffs in the trial court. *May* v. *Cooperman*, 572 F.Supp. 1561, 1563 (D. N.J. 1983). The attorney general of New Jersey, who under New Jersey law would normally be responsible for defending the named defendants, Commissioner of Education and Department of Education, refused to defend the constitutionality of the New Jersey moment of silence law, N.J.S.A. 18A:36-4. *May* v. *Cooperman*, 780 F.2d 240, 242 (3d Cir. 1985). None of the named defendants seek review in this court.

The Speaker of the New Jersey General Assembly, the New Jersey General Assembly, the President of the New Jersey Senate, and the New Jersey Senate intervened in the trial court to defend the constitutionality of the statute. 780 F.2d at 242.

This Court ruled in *Immigration and Naturalization Service* v. *Chadha*, 462 U.S. 919, 940 (1983):

> We have long held that Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional.

Under this ruling, the New Jersey General Assembly and Senate were proper parties to intervene and defend the constitutionality of New Jersey's moment of silence law. Neither of these parties seeks review in this Court (Appendix to Appellees' Motion to Dismiss or Affirm at 1a).

Review in this Court is sought only by Alan Karcher, the former Speaker of the General Assembly and now the minority leader. Assemblyman Karcher has no standing to appeal to this Court. In *Bender* v. *Williamsport Area School District*, ___ U.S. ___, 106 S.Ct. 1326, 1333 (1986), this Court held, "Members of collegial bodies do not have standing to perfect an appeal the body itself has declined to take." In that case, a district court declared a school board action unconstitutional. The school board voted 8 to 1 not to appeal. The dissenting member of the board filed an appeal. This Court ruled that he had no standing to perfect that appeal. The situation here is directly analogous.

Further, Assemblyman Karcher, individually, does not have the required personal stake in the outcome of this suit. *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). "Although injuries suffered by legislators may be different from those of other litigants, the manner of analyzing such injuries for standing purposes is the same." *Daughtrey* v. *Carter*, 584 F.2d 1050, 1057 (D.C. Cir. 1978). Individual legislators have been found to have standing only in those cases where they allege an injury to the effectiveness of their constitutionally mandated role in the lawmaking process. *See*, e.g., *Barnes* v. *Kline*, 759 F.2d 21 (D.C. Cir. 1985) (improper pocket veto); *Moore* v. *United States House of Representatives*, 733 F.2d 946 (D.C. Cir. 1984) (failure of revenue measure to originate in the House); *Riegle* v. *Federal Open Market Committee*, 656 F.2d 873

(D.C. Cir. 1981) (circumvention of Senate's right to advise and consent on executive appointments); *Goldwater* v. *Carter*, 617 F.2d 697 (D.C. Cir.), *vacated on other grounds*, 444 U.S. 996 (1979) (circumvention of the Senate's right to advise and consent on treaties).

In *Harrington* v. *Bush*, 553 F.2d 190 (D.C. Cir. 1977), the court denied standing to an individual congressman seeking to challenge CIA activity as illegal. The court stated:

> There is no doubt that, as a Congressman, appellant occupies a special relationship to the legislative process. This relationship, however, merely defines his power to act in the process, not the impact of any illegality on his Congressional status.

Id. at 214. Assemblyman Karcher can allege no impact on his power to act in the legislative process. Neither his ability to vote nor the effectiveness of his vote has been diminished. The law was enacted in the normal process. Its constitutionality was challenged in the federal courts, and those courts declared its unconstitutionality all in the constitutionally prescribed manner.

In *Daughtrey, supra*, two congressmen challenged executive action implementing President Carter's pardon of Vietnam era draft resistors as a *de facto* repeal of legislation. The court ruled that they had no greater interest in the enforcement of existing law than the average citizen. Just as the congressmen in *Daughtrey* were not specifically injured by non-enforcement of a statute, Assemblyman Karcher is not injured by a court determination that the statute in question here is unconstitutional. For these reasons, amici curiae believe that the appeal should be dismissed.

II. THE PROPOSED INTERVENORS-APPELLANTS ALSO LACK STANDING TO MAINTAIN THIS APPEAL.

The proposed intervenors-appellants seek to intervene in this Court to defend the constitutionality of New Jersey's moment of silence law and to cure any defects in this Court's jurisdiction caused by the lack of standing of appellant Karcher. Interestingly, although the proposed intervenors assert that they meet the requirements for intervention under F.R. Civ. P. 24(a), they do not make any attempt to assert an independent basis for Article III standing. Such an independent basis is obviously needed if the only appellant presently before the Court lacks standing. It is to cure this lack of standing that intervention is sought. Amici curiae assert that the proposed intervenors lack standing and lack the interest required for intervention under F.R. Civ. P. 24(a).

Since this Court has never ruled on the question of whether or not the interest required for intervention under F.R. Civ. P. 24(a) is sufficient to satisfy Article III standing requirements, we will address these two issues separately. In *Donaldson* v. *United States*, 400 U.S. 517, 531 (1971), this Court ruled that F.R. Civ. P. 24(a) required "a significantly protectable interest." This has been interpreted to mean a "legally" protected interest. *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 315 (1985). Although the intervenors express an interest in the issues of this case, it is clearly not legally protected. Indeed, it is much more general and vague than the interest asserted in *Donaldson*. In *Donaldson*, a taxpayer being investigated by the IRS sought to intervene in proceedings initiated by the IRS to enforce summonses issued to third parties having records relevant to the

taxpayer's tax liability. Although the taxpayer faced possible civil or even criminal liability as a result of the IRS investigation, the Court found that his interest was not legally protectable.

In a situation very similar to the one in this case, Justice O'Connor recently discussed the intervention requirements. Like this case, *Diamond* v. *Charles*, ___ U.S. ___, 106 S.Ct. 1697 (1986), involved an attempt by an intervenor citizen to invoke this Court's appellate jurisdiction to review a ruling that a state statute was unconstitutional after the state had declined to seek review. In a concurring opinion, Justice O'Connor expressed the view that F.R. Civ. P. 24(a) required at least an interest "sufficient to support a legal claim or defense which is 'founded upon [that] interest' and which satisfied the Rule's commonality requirement." *Id.* at 1711. Justice O'Connor found such an interest lacking because the intervenor asserted "no actual, present interest that would permit him to sue or be sued by appellees, or the State of Illinois, or anyone else, in an action sharing common questions of law or fact with those at issue in this case." *Ibid.* The same could be said for the proposed intervenors here. Under the position they assert, they could neither sue, nor be sued by, anybody on the basis of the Establishment Clause in relation to New Jersey's moment of silence law.

However, the essential question in regard to the proposed intervention is whether the intervenors would possess the requirements for standing under Article III. Under this Court's recent holding in *Diamond* v. *Charles*, ___ U.S. ___, 106 S.Ct. 1697 (1986), the intervenors clearly lack standing:

> The concerns for state autonomy that deny private individuals the right to compel a State to enforce its laws apply with even greater force to an attempt by a

> private individual to compel a State to create and retain the legal framework within which individual enforcement decisions are made. The State's acquiescence in the Court of Appeals' determination of unconstitutionality serves to deprive the State of the power to prosecute anyone for violating the Abortion Law. Diamond's attempt to maintain the litigation is, then, simply an effort to compel the State to enact a code in accord with Diamond's interests. But "the power to create and enforce a legal code, both civil and criminal" is one of the quintessential functions of a State. *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982). Because the State alone is entitled to create a legal code, only the State has the kind of "direct stake" identified in *Sierra Club* v. *Morton*, 405 U.S. at 740, in defending the standards embodied in that code.

Id. at 1705.

The intervenors have shown no direct stake in the outcome of this litigation, only a desire that the moment of silence law remain in effect. This Court's jurisdiction is not "a vehicle for the vindication of the value interests of concerned bystanders." *United States* v. *SCRAP*, 412 U.S. 669, 687 (1973).

Intervenors think that a moment of silence has educational value (Motion for Leave to Intervene at iv). The present New Jersey legislature apparently does not agree. *See*, letter of Speaker Hardwick to Director, ACLU, Appendix to Appellees' Motion to Dismiss or Affirm at 8a. This is not a dispute for the courts to resolve. Further, the decisions below and this Court's decision in *Wallace* v. *Jaffree*, ___ U.S. ___, 105 S.Ct. 2479 (1985), clearly do not hold that a neutral moment of silence law with a proper legislative purpose would be unconstitutional. As the intervenors point out in their proposed brief on the merits at page 7, a portion of the evidence at trial

consisted of testimony regarding the operation of a local moment of silence policy that predated the state statute. Obviously, the declaration of this law's unconstitutionality is not a legal barrier to a proper moment of silence policy at the state or local level, and the intervenors' interest in such a policy is not impaired. Intervenors raise no First Amendment free exercise claim. Such a claim would have no merit. *Jaffree*, 105 S.Ct. at 2491, n.45. For these reasons, the proposed intervenors lack the standing necessary to maintain this appeal. Should the Court decide that it does have jurisdiction to review the merits of this case, amici curiae present the following comments on the merits.

III. THE NEW JERSEY MOMENT OF SILENCE LAW ON ITS FACE BELIES THE ASSERTED PEDAGOGICAL LEGISLATIVE PURPOSE.

For the second time in recent years, this Court has been called upon to review a state statute establishing a moment of silence as part of the opening exercises in public schools. Two years ago, the Court struck down Alabama's moment of silence law in *Wallace* v. *Jaffree*, ___ U.S. ___, 105 S.Ct. 2479 (1985). The opinion of the Court in *Jaffree* implied, and the concurring opinions of Justice O'Connor and Justice Powell took pains to acknowledge that it was quite possible that a state could pass a moment of silence statute that would pass constitutional muster.

Although the New Jersey law under review here lacks some of the attributes most troubling in the Alabama statute, amici curiae believe that the New Jersey law in question, N.J.S.A. 18A:36-4, is also unconstitutional.

Although troubled by some of the analyses in the courts below, amici curiae concur with the findings of both the

district court and the court of appeals that the statute lacks a valid secular purpose under the first prong of the test enunciated in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). We begin our analysis of the legislative purpose by refuting the secular pedagogical purpose asserted by the intervenor-defendants at trial. This alleged purpose was to provide a transition period that would help to focus students' minds on the educational tasks ahead of them in the school day. *May* v. *Cooperman*, 780 F.2d 240, 244 (3d Cir. 1985).

Justice O'Connor recognized the possible validity of such an educational purpose when she stated in *Jaffree:*

> Since there is arguably a secular pedagogical value to a moment of silence in public schools, courts should find an improper purpose behind such a statute only if the statute on its face, in its official legislative history, or in its interpretation by a responsible administrative agency suggests it has the primary purpose of endorsing prayer.

Wallace v. *Jaffree*, 105 S.Ct. at 2500 (O'Connor, J., concurring).

Amici curiae believe that this statute, on its face, belies any such pedagogical purpose. The statute reads:

> Principals and teachers in each public elementary and secondary school of each school district in this State shall permit students to observe a one minute period of silence to be used solely at the discretion of the individual student, before opening exercises of each school day for quiet and private contemplation or introspection.

N.J.S.A. 18A:36-4. It is submitted that if the New Jersey legislature had made a determination that a moment of silence at the beginning of the school day had educational

value,[1] it would have mandated such an exercise. At the very least, it would have given principals and/or teachers the discretion to determine whether such an exercise would be of value. But that is not what the law does. This law gives students the discretion to observe a moment of silence and commands teachers and principals to bow to their wishes. The court of appeals was correct in holding that the language of the statute can only be interpreted as making student participation voluntary. 780 F.2d 246. The New Jersey legislative scheme places in students complete discretion in their actions and commands school authorities not to interfere. To accept the proposition that this legislative scheme promotes education would require one to have a strange educational philosophy indeed.

Students most in need of the calming and transitional effect that a moment of private contemplation and introspection might provide cannot be compelled to participate. Teachers, principals, or school boards that see no educational value to the exercise have no discretion to dispense with it, and those who see a value in it cannot require participation. Compare the original moment of silence law in Alabama, the constitutionality of which was conceded by all parties in *Jaffree*, 105 S.Ct. at 2481, n.1:

> . . . The teacher . . . shall announce that a period of silence . . . shall be observed for meditation, and during any such period silence shall be maintained and no activities engaged in.

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[1] Amici do not believe it was proper for the district court to listen to expert testimony on the educational value of a moment of silence and substitute its judgment for that of the legislature or to infer an improper legislative purpose based on experts' views of the value of a moment of silence.

By giving control of the classroom to the teacher, this statute, on its face, evinces a plausible secular purpose. In contrast, students in New Jersey may read, or listen through earphones to radios or tape cassettes, or be excused from class during the minute of silence. 780 F.2d at 254 (Becker, J., dissenting). No plausible educational purpose is served by such activity. Acceptance of the pedagogical purpose asserted at trial would require the willing suspension of disbelief.

IV. THE NEW JERSEY MOMENT OF SILENCE LAW GOES BEYOND THE BOUNDS OF PERMISSIBLE ACCOMMODATION OF RELIGION AND ACTS AS AN ENDORSEMENT OF PRAYER.

Amici curiae believe that the legislative purpose of the New Jersey moment of silence law was the impermissible endorsement of prayer during the moment of silence. It is clear that the legislature intended to establish a period of time during the school day when students would be officially "allowed" to pray.

The bill which became the law under review was the eighteenth in a series of bills attempting for more than a decade to establish a moment of silence or even vocal prayer as part of the opening exercises in New Jersey public schools. *May* v. *Cooperman*, 572 F.Supp. at 1563, n.1. Many of the previous bills were much more explicit in their purpose of providing a period of silent prayer. In 1968, A.640 required teachers to "conduct a brief period of silent prayer or meditation with the participation of all pupils." 780 F.2d at 244. In 1969, A.146 authorized "a brief period of silent prayer or meditation." 572 F.Supp. at 1563. Assemblyman Zangari, the sponsor of the law under review, introduced bills in 1980 that called for a constitutional amendment permitting school prayer and sought to establish daily prayer and scripture reading in

New Jersey public schools, 572 F.Supp. at 1563. Both the district court and court of appeals opinions document in further detail the long history of these legislative endeavors in New Jersey. A history of attempts to return prayer to public schools is relevant to the legislative purpose behind the law finally enacted. *Jaffree,* 105 S.Ct. at 2493 (Powell, J., concurring).

Although it is perhaps more directly related to an inquiry into the primary effect of the statute, the almost universal perception of legislators, educators, students, parents, clergy, and the public that the purpose of this law was to set aside time for prayer is relevant to an inquiry into legislative purpose. The district court opinion documents the perception to this effect of opponents and supporters of the law. The fact that the language of the law allows students complete discretion regarding participation and the fact that school administrators felt compelled to allow objecting students to absent themselves, 572 F.Supp. at 1567, indicates that all concerned believe the exercise has some religious connotation.[2]

A. Accommodation Aimed At Lifting Government Placed Burdens On Free Exercise Are Permissible.

As Justice O'Connor pointed out in *Jaffree*, "[i]t is disingenuous to look for a purely secular purpose when the manifest objective of a statute" is to accommodate religion. 105 S.Ct. at 2504 (O'Connor, J., concurring). Not all actions of the government taken pursuant to religious considerations are unconstitutional. State action moti-

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[2] The district court's reliance on the testimony of interested witnesses as to statements made by some legislators during portions of the floor debate is clearly an improper method of determining legislative purpose.

vated by religious concerns can be divided into three categories.

The first category is action mandated by the Free Exercise Clause. For example, this Court ruled in *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), that the Free Exercise Clause required Wisconsin to exempt members of the Amish religion from certain provisions of the state's compulsory education laws. Many states have since adopted amendments to their compulsory education laws generically referred to as "Amish exemptions." The passage of these obviously religiously motivated laws did not violate the Establishment Clause. This case does not involve a claim that the Free Exercise Clause mandated the state action involved. There is no free exercise right to compel the state to set aside time for prayer during the school day. *Jaffree*, 105 S.Ct. at 2491, n.45.

The second category of religiously motivated state action is permissible government attempts to accommodate free exercise values that are not constitutionally mandated. An example of such an action would be the property tax exemption for churches upheld by this Court in the face of an Establishment Clause challenge in *Walz* v. *Tax Commission of the City of New York*, 397 U.S. 664 (1970). *See* also *Braunfeld* v. *Brown*, 366 U.S. 599, 608 (1961) (holding that a state could, but was not required to, exempt Saturday Sabbatarians from Sunday closing laws).

The third type of religiously motivated action is that which is banned by the Establishment Clause as an impermissible advancement or inhibition of religion. One example is the Alabama moment of silence law struck down in *Jaffree*.

The question presented by this case is whether the New Jersey moment of silence statute falls within the

second or third categories. Put another way, "[t]he challenge is how to define the proper Establishment Clause limits on voluntary government efforts to facilitate the free exercise of religion." *Jaffree*, 105 S.Ct. at 2504 (O'Connor, J., concurring).

Amici curiae believe that Justice O'Connor perceived the correct limit to government efforts to accommodate religion when she stated that such efforts should be directed at lifting government imposed burdens on free exercise. *Ibid.* Justice O'Connor recognized that such a standard would not save the Alabama statute in *Jaffree*. *Ibid.*

B. No Burden On Silent Prayer Existed Prior To The Enactment Of The New Jersey Moment Of Silence Law.

Both Justice Stevens, writing for the majority, and Justice O'Connor pointed out in *Jaffree* that nothing in the Constitution, the laws of Alabama, or any government practice prevented students from voluntarily praying at any time during the school day. *Id.* at 2491, n.45, and 2496 (O'Connor, J., concurring). The situation was the same in New Jersey prior to the enactment of its moment of silence law. This fact was alluded to by Governors Cahill and Byrne when they vetoed previous moment of silence bills. 780 F.2d at 244, 572 F.Supp. at 1563.

Despite veto messages from two consecutive governors that such laws served no useful purpose, and without any assertion that private, silent prayer or contemplation was in any way impeded, the legislature persisted in its efforts and finally established a moment of silence law over the governor's veto. The Court in *Jaffree* refused to assume that the legislative enactment in that case was "nothing but a meaningless or irrational act." 105 S.Ct. at 2492.

Yet, that is exactly what the New Jersey law amounts to unless one acknowledges a legislative purpose to voice the state's approval of prayer in public schools. When a legislature goes out of its way to establish a period during which prayer is "allowed" when there existed no rules or policy that disallowed prayer at that time and place, the undeniable message to the public is that prayer is favored by the state. The Establishment Clause "preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred." *Id.* at 2497 (O'Connor, J., concurring).

Not only was there no impediment to silent prayer, there was nothing to prohibit local school boards, principals, or teachers from instituting a moment of silence policy if it was believed to be of educational value. The evidence showed that the Sayreville School District had been conducting a moment of silence since 1969. 572 F.Supp. 1566. Therefore, the state action challenged here is different from that in *Zorach* v. *Clausen*, 343 U.S. 306 (1952). In that case, "[t]he teacher . . . cooperate[d] in a religious program *to the extent of making it possible* for her students to participate in it." *Id.* at 313 (emphasis added).

C. The Message Conveyed By The New Jersey Moment Of Silence Law Is One Of Endorsement Of Prayer.

Justice O'Connor indicated in *Jaffree* that the primary effect prong of the *Lemon* test could "help decide those close cases where the validity of an expressed secular purpose is in doubt." 105 S.Ct. at 2500 (O'Connor, J., concurring). The view that the legislative purpose for the New Jersey moment of silence statute was the endorsement of prayer in the public schools is bolstered by the evidence as to the primary effect of the law. The district

court made findings based upon substantial evidence that the widespread public perception of the purpose of the law was the promotion of prayer.

Both proponents and detractors of the bill saw it as an attempt to reintroduce prayer into public schools. The American Baptist Churches of New Jersey opposed the bill as an "attempt by the state to impose something having the appearance and nature of a religious observance" that would in effect "trivialize" true religion. However, some American Baptist pastors supported the bill as a useful way to bring religion into the schools. 572 F.Supp. at 1565. The New Jersey School Board Association opposed the bill as promoting prayer in school with no educational purpose. A minority within the organization felt that prayer should be returned to the schools. *Ibid.* The New Jersey Education Association perceived the bill to be "a backdoor approach to bringing prayer into the public school." *Ibid.*

The perception among students in school districts around the state as to the religious purpose of the law was similar. In Princeton, the moment of silence was "generally considered a form of prayer which some students opposed and some approved." *Id.* at 1566. In Roosevelt, the testimony showed that most of the students in the 8th grade history class "opposed a moment of silence on the ground it constituted prayer." *Id.* at 1567. A high school student in Hillsborough testified that the moment of silence violated his beliefs. *Ibid.* The superintendent of Paramus schools testified that "students and teachers generally perceived the minute of silence Bill as an effort to circumvent the Supreme Court decisions and to reintroduce prayer into the schools." *Ibid.*

Parents also saw a religious purpose behind the law. Parents in Old Bridge Township testified that they viewed

the moment of silence as "an essentially religious observance." *Ibid.* The superintendent of Princeton schools testified that parents had called him to complain that the exercise was "a form of enforced prayer." *Ibid.* The district court opinion recited instances of other similar reactions.

Standing alone, such evidence of public perception may not be enough to invalidate a law. But where the law in question has no discernible purpose other than the "accommodation" of religion and the religious exercise accommodated needs no such accommodation for its free practice, the law gives a message of endorsement of prayer. The identification of government with a message of endorsement of religion violates a core purpose of the Establishment Clause. *Grand Rapids School District* v. *Ball*, ___ U.S. ___, 105 S.Ct. 3216, 3226 (1985). Practices having such an effect, "whether intentionally or unintentionally, . . . in reality or public perception," are unconstitutional. *Lynch* v. *Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring).

CONCLUSION

For the reasons above, amici curiae believe that the Court does not have jurisdiction to hear this appeal. In the alternative, amici urge this Court to affirm the decision of the Third Circuit Court of Appeals.

Dated:

Respectfully submitted,

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